79-777



In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF VERMONT,
Petitioner

v.

JOHN A. WILLIAMS,
Respondent

# PETITION FOR A WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

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## CITATIONS





## PETITION FOR A WRIT OF CERTIORARI TO THE VERMONT SUPREME COURT

The People of the State of Vermont respectfully petition that a Writ of Certiorari issue to review the judgment of the Vermont Supreme Court entered on June 20, 1979 and left undisturbed by appellee's motion for reargument which was denied on August 15, 1979.

## OPINION BELOW

The opinion of the Vermont Supreme Court, decided on June 20, 1979, has yet to be published. It is printed as Appendix A hereto. The denial of appellee's motion for reargument is printed as Appendix B hereto.

## JURISDICTION

The Vermont Supreme Court entered judgment in this case on June 20, 1979. A timely motion for reargument was filed on July 5, 1979. On August 15, 1979 the Vermont Supreme Court entered its order denying appellee's motion for reargument. The mandate was issued seven days later on August 22, 1979 in accordance with Vermont Rules of Appellate Procedure, Rule 41. Upon motion of the parties, resentencing was stayed pending the State of Vermont's petition for writ of certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) and Supreme Court Rule 19.1(a).

## QUESTION PRESENTED

Where an offender has been convicted of three counts of lewd and lascivious conduct with a juvenile, does the Due Process Clause of the Fourteenth Amendment to the United State's Constitution prohibit a sentencing judge from considering heresay allegations involving the offender's history of prior antisocial conduct, including sexual activity with male juveniles for which he had not been duly convicted — at least

where the accuracy of this information has never been contested?

## CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Vermont Rules of Criminal Procedure, Rule 32(c)(2) provides:

> **Report.** The report of the presentence investigation shall contain any prior criminal record of the defendant and such information on his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

## STATEMENT OF THE CASE

On September 19 and 20, 1978 the accused was tried by court pursuant to informations charging three counts of lewd and lascivious conduct and one count of kidnapping a juvenile. The trial court found the accused guilty on all three counts of lewd and lascivious conduct and acquitted him on the charge of kidnapping. Judgment on the verdict was entered on the morning of September 20, 1979 and the accused was sentenced that afternoon. Pursuant to V.R.Cr.P. 32 and 28 V.S.A. §204(b) the court did not order a new presentence investigation but instead relied on a presentence report prepared on the accused within the last year.

In addition to the presentence report and the evidence introduced at trial, the court considered information presented by the Deputy State's Attorney for Washington County summarizing an investigation by the Barre City Police in which at least eight statements were taken from juvenile males



indicating that they had engaged in sexual activity with the accused on numerous occasions. T.T. 195-199.* The respondent objected to the use of any of this information, claiming that it was irrelevant for the purposes of sentencing. T.T. 190-191. The sentencing judge overruled the objection, finding the evidence to be highly relevant to a full understanding of the defendant's propensities. T.T. 191, 193. The sentencing judge thereupon considered the information, not

> . . . from the point of view of prior criminal conduct (but rather) . . . from the point of view of what this man's propensities are, what type of problems he may have that need to be addressed. . . . (I)t won't so much have to do with the length of the sentence as the type of the sentence. T.T. 192-193.

At no time during the sentencing hearing did the defendant or his attorney challenge the accuracy of this police investigation and the conduct alleged therein. At no time did the defendant or his attorney demand to cross-examine any of the individual juveniles who signed statements. Although the investigation was summarized to the sentencing judge, copies of each of the statements were given to the defense prior to sentencing. Defense attorney indicated that he had read the statements, T.T. 199, and that he had personally interviewed two of the youths involved. T.T. 199-200. Rather than challenging the accuracy of the information, the defense stressed its consensual nature:

> My feeling, in reading these statements and in talking to two of the ones that I have, feel that these boys were old enough to know what they were doing, and they were having a party of sorts. T.T. 199-200.

The use of this information was challenged on appeal to the Vermont Supreme Court. That court concluded:

> Irrespective of diagnostic or therapeutic advantages consistency with the basic concerns of criminal justice

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* Trial Transcript

> compel us to prohibit, even in sentencing proceedings, the use of mere assertions of criminal activities in any way in aid of determining disposition. **State v. Williams,** Vermont Supreme Court Docket Nos. 302-77 and 303-77 (filed June 20, 1979) slip op. at 4.

The only case law cited by the Vermont court in direct support of its opinion was **Dunn v. United States,** ..... U.S. ....., 47 L.W. 4607 (June 4, 1979) and **Cole v. Arkansas,** 333 U.S. 196 (1948), both of which construed the Due Process Clause, neither of which had anything to do with the use of hearsay allegations at sentencing.

## REASONS FOR GRANTING THE PETITION

### A. Jurisdiction: A federal question is involved.

The Vermont Supreme Court made no mention of existing state law in support of its holding. Rather, its reliance on **Dunn** and **Cole** and its express language regarding "the basic concerns of criminal justice" together point exclusively to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The jurisdiction of this Court is far clearer here than it was in **Delaware v. Prouse,** ..... U.S. ..... 99 S.Ct. 1391 (1979) where the Delaware Supreme Court had expressly based its opinion on both the Delaware and United States Constitutions. This Court noted,

> (h)ad state law not been mentioned at all, there would be little question about our jurisdiction, even though the state constitution might have provided an independent and adequate state ground. **Id.** at 1395-96, **citing, Zacchini v. Scripps-Howard Broadcasting Co.,** 433 U.S. 562 (1977)

While it is possible that the Vermont Supreme Court could have based its ruling on the Vermont State Constitution, it made no mention of Vermont law. The mere possibility of an independent and adequate state ground does not preclude the jurisdiction of this Court, especially where the reliance on the United States Constitution is so clear.



### B. The opinion of the Vermont Supreme Court is not in accord with applicable decisions of the Supreme Court of the United States.

The opinion of the Vermont Supreme Court is not in accord with applicable decisions of this Court, Supreme Court Rule 19.1(a), in particular, **Williams v. New York,** 337 U.S. 241 (1949) and **United States v. Grayson,** 438 U.S. 41 (1978).

In **Williams** the defendant was convicted of murder committed during the course of a burglary. The sentencing judge decided to reject the jury's recommendation of life imprisonment and impose the death penalty. In doing so he expressly relied in part on hearsay allegations that the defendant had been engaged in " 'thirty other burglaries in and about the same vicinity' where the murder had been committed." **Id.** at 244.

There, as here, no challenge was ever made to the accuracy of these hearsay allegations. **Id.** at 244. There, as here, no request was ever made for a "chance to refute or discredit any of (the allegations) . . . by cross examination or otherwise." **Id.** at 244. There, as here, the only challenge raised was whether it is violative of due process for the sentencing judge to consider hearsay allegations, regardless of their accuracy.

This Court, in **Williams,** affirmed the use of such hearsay information — as long as the accuracy was not in dispute — reasoning that it was properly, even necessarily, considered by the sentencing court in rendering an intelligent and rational sentence. Justice Black, speaking for the majority, recognized the desirability of the modern penological goal of individualization in sentencing. He noted that most state legislatures had given courts a wide range of discretion to tailor sentences to individual offenders. He continued that, if such discretion is to be rationally exercised, a wide range of sentencing information must be available regarding the offender's "past life, health, habits, conduct, and mental and moral propensities." **Id.** at 245.

> [The sentencing judge's] task within fixed statutory or constitutional limits is to determine the type and

> extent of punishment after the issue of guilt has been determined. Highly relevant — if not essential — to his selection of an appropriate sentence is the posession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial. **Id.** at 247.

The holding in **Williams** remains undisturbed some thirty years later.[1] Recently, in **United States v. Grayson, supra** this Court held that it is proper for a sentencing judge, "in fixing the sentence within statutory limits, to give consideration to the defendant's false testimony observed by the judge during trial." **Id.** at 42. The Court's decision was clearly and deeply rooted in **Williams.** Chief Justice Burger, speaking for a 6 - 3 majority, ringingly reaffirmed the goals of individualization and rehabilitation. In doing so, he explained the rationale of **Williams:**



> Indeterminate sentencing under the rehabilitation model presented sentencing judges with a serious practical problem: how rationally to make the required predictions so as to avoid capricious and arbitary sentences, which the newly conferred and broad discretion placed within the realm of possibility. An obvious, although only partial solution was to provide the judge with as much information as reasonably practical concerning defendant's "character and propensities, . . . his purposes and tendencies." **United States v. Grayson, supra** at 48 (citations omitted).

Chief Justice Burger concluded that any rule eclipsing the use of such information at sentencing would amount to an open invitation to arbitrary and capricious sentencing.

> The "parlous" effort to appraise "character" degenerates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning "every aspect of a defendant's life." **Id.** at 53 (citations omitted).

He continued that such a rule would also be contrary to the

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1. This does not mean that substantial changes have not occurred in the area of sentencing and the rights of the defendant to challenge sentencing information. Until as recently as 1975, F.R. Cr.P. 32(c) left disclosure of sentencing information in federal courts up to the discretion of the sentencing court. In 1975 that rule was amended to require disclosure of all sentencing information to defendant or his attorney upon request, with certain exceptions. Even those exceptions regarding confidential information may be undermined by the United States. Supreme Court's ruling in **Gardner v. United States,** 430 U.S. 349 (1977) which held that in capital cases all adverse information considered by the sentencing court must be disclosed to the defendant.

   In addition, some courts have held that disclosure must be sufficiently in advance of sentencing to allow the defendant and his attorney opportunity to verify the accuracy of adverse allegations and decide whether to challenge its reliability. See, e.g., **United States v. Robin,** 545 F.2d 775 (2nd Cir. 1976). Given the right of the defendant to be sentenced on reliable information, e.g., **United States v. Tucker,** 404 U.S. 447 (1972); **Townsend v. Burke,** 334 U.S. 736 (1948), some courts are requiring that adverse information supplied to the court at sentencing, if challenged, must be proven by "clear and convincing evidence", **United States v. Fatico,** 458 F. Supp. 389 (E.D.N.Y. 1978), notwithstanding the prevailing view that at sentencing such information need be proven merely by a prepondenance of the evidence. E.g., **United States v. Sweig,** 454 F.2d 181 (2nd Cir. 1972).

   However, such trends in the area of sentencing have left the Supreme Court's holding in **Williams** undisturbed to the extent that where accuracy is not contested, hearsay information adverse to the defendant may be considered at sentencing. The emerging rights of disclosure and accuracy of sentencing information may result in an increase in evidentiary hearings prior to sentencing. However, where over 90% of all criminal cases are resolved by pleas, such attention at sentencing is hardly unwarranted. Moreover, it is highly unlikely that either defendants or prosecutors would risk the wrath of the sentencing court by raising frivolous challenges to sentencing information. In any case, increased use of evidentiary hearings at sentencing should be welcomed to assure the accuracy of the information considered by the court in imposing sentence.

holding in **Williams** which permitted "the sentencing judge to consider the offender's history of prior antisocial conduct, **including burglaries for which he had not been duly convicted." United States v. Grayson, supra** at 54 (emphasis added).

Clearly, the Vermont Supreme Court's opinion flies in the face of this consistent and strongly articulated **stare decisis.** It may be a well intentioned effort at promoting fairness at sentencing. Unfortunately it is misdirected, causing more unfairness than it prevents. The first effect is a sterilization of reports resulting in an exclusion of any and all adverse factual allegations, regardless of the reliability of the information. This may benefit those who have something to hide. However, it renders them indistinguishable from those who don't have anything to hide. A sentencing judge simply doesn't know whether a spotless report is accurate or bleached. An arbitary guessing game ensues.

The second effect is an increasing use of conclusory opinions such as, "This man has a violent disposition" or "an unresolved tendency toward sexual deviancy." These conclusions are obviously based on unreported factual allegations known to the probation officer. However, while the allegations themselves might be subject to a fact challenge to determine their accuracy, conclusions and opinions of the probation officer are difficult to assail.

For both of these reasons, judges are more and more forced to read between the lines of the presentence report in order to figure out the basis for the probation officer's recommendation. To that extent the possibility of an arbitrary and capricious exercise of sentencing discretion is increasing, not decreasing, in the State of Vermont.

The Petitioner submits that greater fairness is achieved by allowing the use of such allegations, provided that full disclosure is made and factual challenges are permitted. The Petitioner submits that it is far better that a sentencing



decision be based on facts subject to challenge rather than on conclusions and inuendo which are difficult to dispute.

In conclusion, the Petitioner asserts that the Vermont Supreme Court has adopted a disturbing position in a misguided effort to promote fairness at sentencing. The opinion is having a profound and troubling impact on the sentencing courts here in Vermont. The opinion is clearly not in accord with the applicable decisions of the Supreme Court of the United States. As such, it should be reversed.

## CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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PHILIP H. WHITE,
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APPENDIX A.
Nos. 302 and 303-77

State of Vermont
v.
John Williams

Supreme Court
On Appeal From
District Court of Vermont
Unit 5, Washington Circuit
April Term, 1979

Present: Barney, C.J., Daley, Larrow, Billings and Hill, JJ.

Barney, C.J. The defendant was charged by the state's attorney with lewd and lascivious conduct with a minor child in violation of 13 V.S.A. § 2602. Trial by jury was waived and the defendant found guilty of three offenses under this statute. The court found him not guilty of a kidnapping charge. Sentencing has been accomplished and the defendant brings this appeal.

Three issues are raised. The first relates to the burden of the State to establish that the crime charged occurred on a particular day. This relates only to the first of the three charges making up the conviction. This portion of the information alleged that "on or about October 17, 1976" the defendant committed one of the acts which he is charged. The argument of the defendant is that the particular act involved, under the evidence, probably was not committed until the early hours of October 18, a date on which the defendant was charged with a second offense.

With the law of this State expressly holding that, as to this crime, time of commission is not an essential element calling for precise proof as pleaded, **State v. Daniels,** 129 Vt. 143, 144, 274 A.2d 480 (1971), this claim of error looks elsewhere. The factual basis for the contention has a parallel in the facts of **State v. Bleau,** 132 Vt. 101, 103-4, 315 A.2d 448 (1974), which also dealt with the significance of time as part of certain criminal charges. In the **Bleau** case it is pointed out



that not only was time not of the essence, but that the relationship of the criminal episode to midnight made the allegation of date necessarily uncertain, without amounting to a substantive shortcoming in the pleading.

The defendant argues that because the three counts of lewd and lascivious conduct upon which he was tried alleged offenses on or about October 17, 18 and 19 the State had a special burden to have its proof conform to the pleadings. The justification is said to be that with an offense already charged on the 18th, proof of an offense charged on the 17th that may have occurred past midnight somehow raises the spectre of double jeopardy on the 18th. The plain answer is that if two, or even three separate offenses were established, all on the 18th, there is no double jeopardy problem. Otherwise a criminal committing repeated offenses on the same date acquires a kind of immunity after the first one. This is, of course, not the law. So long as the proof sufficiently establishes the individual repeat offenses, the coincidence of date alone is no defect. In any event, the evidence is sufficient to support the findings of the trial court.

The defendant also raises an issue he identifies as a "speedy trial" issue. It relates to the action of the State in bringing two additional charges of lewd and lascivious behavior with the same minor. The offenses were alleged to have occurred at about the same time as the charge supporting the original arrest, but were not filed until some nine months later. For some reason the defendant ascribes the condemnation of Administrative Order 5, 12 V.S.A. and the constitutional claim to the charges brought nearest the time of trial. The measurement of time in cases raising the issue of deprivation of a speedy trial begins with the arrest, not on some other charge, but on the charge attacked. The measurement of delay applied to a criminal charge cannot commence until that charge is brought against the defendant. **State v. Dragon** 130 Vt. 570, 298 A.2d 856 (1972). The defendant here did not ask for dismissal of the delayed charge,

but rather of the two charges upon which trial was had within one week of service. This position will not support reversal.

The matter does merit further comment, however. The defendant had a real complaint when the state failed to comply with the trial judge's direction to bring any additional counts involving the criminal incident being prosecuted by July 15, 1977. In fact, the defendant was not arraigned on the new counts until August 19, 1977. These did not sufficiently establish probable cause in their affidavits to avoid dismissal. They were rebrought on September 12. The defendant objected, but his motion to dismiss was denied.

This motion was based on the same speedy trial contentions already noted, and also raised the issue of compliance with the trial court's instructions, to which the state agreed. It is the position of the defendant that for the trial court to do anything less than dismiss the additional charges was an abuse of discretion, and should be reversed here.

What the trial court did do was limit the consequences of the additional charges. This case was tried to the court, and the judge informed the state that, although the late filing would be permitted, the changes, if established, would not enhance the sentence or otherwise cumulate the penalty to be assessed if the original charge was proved. This ruling benefitted the defendant in the sense that the consideration of these charges would bar them from use as the basis of new and separate complaints, by virtue of double jeopardy restrictions. He also got the benefit of their disposition without sentencing penalty.

This was an appropriate exercise of discretion by the trial court. Nowhere is it established that the delayed filing of the amendments affected the trial date previously set. That trial date has never been a matter of complaint with respect to the initial lewd and lascivious conduct charge. As already noted, the previously set trial date required that the additional charges go to trial within a week, but this expedition is not



complained of, nor will it support the speedy trial issue. The actions of the trial court were within the ambit of its discretion and representated no wrongful disregard of any rights of the defendant as presented to the court.

It is contended here that there was placed before the trial court hearsay information about criminal activities of a sexually deviant nature on the part of the defendant for which he had never been charged, tried or convicted. The defendant objected to such information, and the trial judge responded that he did not view it as having to do with the length of the sentence but rather as information relating to the defendant's propensities and the type of sentence that would best address the defendant's problems.

Irrespective of diagnostic or therapeutic advantages, consistency with the basic concerns of criminal justice compel us to prohibit, even in sentencing proceedings, the use of mere assertions of criminal activities in any way in aid of determining disposition. The ease with which such untried allegations could become the basis for sentencing sanctions is all too apparent. As Justice Marshall put it in **Dunn v. U.S.**, 47 L.W. 4607, 4609, (June 4, 1979), citing **Cole v. Arkansas**, 33 U.S. 196, 201 (1948).

> (I)t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

For an analogous holding on the civil side, see **Bristol v. Schwolow**, 122 Vt. 311, 313, 170 A.2d 639 (1961).

With the concern so clear, the result must follow: the defendant is entitled to be resentenced without the presentation of claim of criminal acts never validated by judgment of conviction. This is consistent with the appropriate content of presentence considerations as set out in A.B.A. Standards, Probation § 23, Commentary p. 37 (Approved Draft, 1970). To insure no inadvertent prejudice, the resentencing should be before a different judge.

**The judgments of conviction are affirmed, the sentences vacated and the cause is remanded for resentencing in accordance with the views expressed in the opinion.**

FOR THE COURT:

ALBERT A. BARNEY,
Chief Justice



APPENDIX B.

**ENTRY ORDER**

Filed August 16, 1979, Vermont Supreme Court.
Supreme Court Docket No. 302-77 and 303-77
June Term, 1979

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| State of Vermont | Appealed from: |
| v. | District Court of Vermont Unit 5, Washington Circuit |
| John Williams | Docket No. 1076-76WnCr 1229-77WnCr |

In the above entitled cause the Clerk will enter:

Motion for Reargument denied.

BY THE COURT:

ALBERT W. BARNEY, Chief Justice
RUDOLPH J. DALEY,
ROBERT W. LARROW,
FRANKLIN S. BILLINGS,
WILLIAM C. HILL,
Associate Justices